

**A The Minister for Human Resources v Thong Chin Yoong
and another appeal**

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEALS NO 01-4 OF
2000 (W) AND 02-17 OF 2000 (W)

B WAN ADNAN CJ (MALAYA), SITI NORMA YAAKOB AND HAIDAR FCJJ
28 JULY 2001

*Civil Procedure — Appeal — Appeal to Federal Court — Question for determination
of Federal Court — Issue not determined by Court of Appeal or High Court — Whether
question framed comes within s 96(a) Courts of Judicature Act 1964 — Whether Federal
Court should decline to answer question*

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*Labour Law — Industrial Court — Discretion of Minister — Mixed questions of law and
fact — Minister refused to refer complaint to Industrial Court, whether Minister erred*

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The High Court issued an order of certiorari to quash the decision of the Minister made under s 20(3) of the Industrial Relations Act 1967 ('the Act') declining to refer the representations of the claimant to the Industrial Court for an award as well as an order of mandamus directing the Minister to refer the representations to the Industrial Court. The High Court held that the Minister erred in the exercise of his discretion under s 20(3) of the Act in declining to refer the representations of the claimant to the Industrial Court. The Court of Appeal upheld the decision of the High Court. The Federal Court granted leave to appeal and framed the following question for its determination: 'Whether the employer can suspend an employee without loss of pay, benefits and perks pending the conclusion of the investigations and inquiries into his conduct notwithstanding that this is not stated in the terms of employment'. The claimant raised a preliminary objection that the question as framed does not come within the meaning of s 96(a) of the Courts of Judicature Act 1964 ('the CJA') and hence the appeal should be dismissed forthwith.

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Held, allowing the preliminary objection:

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- (1) The High Court and the Court of Appeal did not consider the issue of suspension except to say that it may be relevant for the purpose of determining whether the claimant was entitled to declare that he was constructively dismissed. This issue involved mixed questions of law and fact for the Industrial Court. Further, the question as framed seems to indicate that it was a point of law in which case then the proper forum to consider would be the Industrial Court. Hence, the Minister erred in the exercise of his discretion under s 20(3) of the Act (see p 231C-D).
- (2) The Federal Court was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. To that extent the proper order that the court should make would be to decline to answer the question. It is best that the issue of

suspension be considered by the Industrial Court in determining whether the claimant was dismissed without just cause or excuse. In the circumstances of the case the court agreed with the preliminary objection that the question framed by this court for its determination did not come within the ambit of s 96(a) of the CJA (see p 231E-G).

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[Bahasa Malaysia summary]

Mahkamah Tinggi telah mengeluarkan satu perintah certiorari untuk membatalkan keputusan Menteri yang dibuat di bawah s 20(3) Akta Perhubungan Perusahaan 1967 ('Akta tersebut') kerana enggan untuk merujuk representasi-representasi pihak yang menuntut kepada Mahkamah Perusahaan untuk satu award dan juga satu perintah mandamus mengarahkan Menteri merujuk representasi-representasi pihak yang menuntut kepada Mahkamah Perusahaan. Mahkamah Tinggi memutuskan bahawa Menteri telah silap menggunakan bidang kuasa beliau di bawah s 20(3) Akta tersebut kerana enggan untuk merujuk representasi-representasi pihak yang menuntut kepada Mahkamah Perusahaan. Mahkamah Rayuan telah mengekalkan keputusan Mahkamah Tinggi. Mahkamah Persekutuan telah memberikan kebenaran untuk membuat rayuan dan membentuk persoalan-persoalan berikut untuk penentuannya: 'Sama ada majikan boleh menggantung seorang pekerja tanpa kerugian gaji, faedah dan ganjaran-ganjaran sementara menunggu keputusan soal siasat perbuatan beliau walaupun ini tidak dinyatakan dalam terma-terma pekerjaannya'. Pihak yang menuntut telah menimbulkan satu bantahan awal bahawa persoalan yang dibentuk tidak terlingkung dalam maksud s 96(a) Akta Mahkamah Kehakiman 1964 ('AMK') dan oleh itu rayuan tersebut sepatutnya ditolak.

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Diputuskan, membenarkan bantahan awal tersebut:

- (1) Mahkamah Tinggi dan Mahkamah Rayuan tidak mengambilkira persoalan penggantungan kecuali dengan mengatakan bahawa ia mungkin relevan bagi tujuan menentukan sama ada penuntut berhak untuk mengatakan bahawa beliau telah dipecat secara konstruktif. Persoalan ini melibatkan gabungan persoalan-persoalan undang-undang dan fakta untuk Mahkamah Perusahaan. Tambahan lagi, persoalan-persoalan yang dibentuk kelihatan seperti menunjukkan bahawa ia adalah perkara undang-undang di mana forum yang betul untuk memberi pertimbangan adalah Mahkamah Perusahaan. Oleh itu, Menteri telah silap menggunakan bidang kuasa beliau di bawah s 20(3) Akta tersebut (lihat ms 231C-D).
- (2) Mahkamah Persekutuan telah ditanya untuk mempertimbangkan satu persoalan yang tidak ditentukan oleh Mahkamah Tinggi dan Mahkamah Rayuan. Setakat itu perintah yang betul yang

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- A mahkamah patut buat adalah untuk menolak untuk menjawab persoalan tersebut. Adalah terbaik jika persoalan penggantungan dipertimbangkan oleh Mahkamah Perusahaan dalam menentukan sama ada pihak yang menuntut dipecat tanpa sebab atau alasan yang adil. Dalam keadaan kes ini mahkamah bersetuju dengan bantahan awal tersebut bahawa persoalan yang dibentuk oleh mahkamah ini untuk penentuannya tidak terlingkung dalam s 96(a) AMK (lihat ms 231E–G).]
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Notes

- C For a case on appeal to the Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 599.
For cases on discretion of Minister, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1220–1233.

Cases referred to

- D *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 (refd)
Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238 (refd)
Minister of Labour, Malaysia v Chan Meng Yuen & Anor [1992] 2 MLJ 337 (refd)
- E *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

Legislation referred to

- F Courts of Judicature Act 1964 s 96(a)
Industrial Relations Act 1967 s 20(1), (2), (3)
Rules of the Federal Court 1995 r 108(1)(c)
- G *Asmabi Mohamad* (Attorney General's Chambers) and *VK Lingam* (*S Rutheran*, *S Ashokvijay* and *KV Kanahalashimi* with him) (*V Siva and Partners*) for the appellant
B Lobo (*LG Seah* with him) (*Lobo & Associates*) for the respondent

- H **Haidar FCJ** (delivering judgment of the court):. There are two appeals, Civil Appeal No 01–4–2000 (W) is by the Minister for Human Resources ('the Minister') and Civil Appeal No 02–17–2000 (W) is by Berjaya Industrial Bhd ('the company'). Thong Chin Yoong ('the claimant') is the respondent in respect of both appeals.

- I As agreed by the parties, we directed the two appeals be heard together as in the Court of Appeal as they emanate from an order of the High Court dated 25 June 1996, and which order was affirmed by the Court of Appeal on 14 April 1999. The High Court, by its order of 25 June 1996, issued an order of certiorari to quash the decision of the Minister made on 21 January

1995 under s 20(3) of the Industrial Relations Act 1967 ('the Act') declining to refer the representations of the claimant to the Industrial Court for an award, as well as an order of mandamus directing the Minister to refer the representations to the Industrial Court.

In granting leave to appeal on 28 August 2000, the Federal Court, pursuant to r 108(1)(c) of the Rules of the Federal Court 1995, framed the following question for its determination:

Whether the employer can suspend an employee without loss of pay, benefits and perks pending the conclusion of the investigations and inquiries into his conduct notwithstanding that this is not stated in the terms of employment?

Mr Lobo, counsel for the claimant, gave notice that he intended to raise a preliminary objection, that is, the question as framed does not come within the meaning of s 96(a) of the Courts of Judicature Act 1964 ('the CJA') and hence the appeal should be dismissed forthwith.

We indicated to the counsel for the parties to submit on the preliminary objection and the merits of the appeal at one go.

The facts of the case are essentially not disputed and can be shortly stated as follows.

The claimant joined the company on 16 August 1988 as a hotel and resort development manager. On 1 January 1994, the claimant's position was redesignated as vice president and general manager (hotel and resorts) on A3 Grade. The terms and conditions of service remained unchanged.

On 30 March 1994, the company caused a notice to be issued to the claimant suspending him from his work with immediate effect until further notice in writing by the company. The suspension did not involve in the claimant's loss of emoluments, benefits and other perks until the investigation was completed.

On 21 April 1994, the claimant wrote to the company to inquire his position in the company since the date of his suspension. The claimant asked the company to inform him regarding his position before 28 April 1994, failing which he would have to reconsider his stand in the matter.

On 25 April 1994, the company responded by letter informing the claimant that the allegations of misconduct against him were still in progress and his suspension from work with full pay would continue until the investigation was completed. The company undertook to inform the claimant of the outcome of the investigation.

By a letter dated 26 April 1994 to the company, the claimant in referring to his letter dated 21 April 1994, and the company's reply dated 25 April 1994, alleged 'It is clear to me now that the company did not have any material justifying my sudden suspension by its letter of 30 March 1994. Your prolonged 'investigations' confirm this fact. The claimant at the same time gave an ultimatum to the company to lift the suspension and revert him to his job in the company on or before 4 May 1994, failing which he would have no alternative but to consider himself dismissed by the company with effect from that date.

- A** The company responded vide a letter dated 3 May 1994, saying that the allegation of the claimant was totally misconceived and unfounded. The company further reiterated that it had received reports of alleged acts of gross misconduct committed by the claimant. It was further stated that the nature, gravity and the seriousness of the allegations were such as to warrant in depth and prolonged investigations by the company. As the investigations
- B** by the company was still in progress, the company could not accept the claimant's ultimatum to lift the suspension on or before 4 May 1994. The company undertook to notify the claimant of the outcome of the investigation as soon as the investigation is completed.

- C** The claimant, not being satisfied with the stand taken by the company, vide a letter dated 3 May 1994 to the company, said that he had no alternative but to consider himself dismissed with effect from 4 May 1994. He notified the company that he would be seeking legal remedies opened to him.

- D** The claimant subsequently wrote a letter dated 10 May 1994 to the director general of industrial relations seeking reinstatement into his former employment under s 20(1) of the Act. In his letter, the claimant claimed that he was dismissed without just cause or excuse with effect from 4 May 1994.

- E** Apparently, the director general of industrial relations was satisfied that there was no likelihood of the representations being settled, and he accordingly notified the Minister pursuant to s 20(2) of the Act.

The Minister, in exercise of his discretion under s 20(3) of the Act, thought that the claimant's representations were not fit to be referred to the Industrial Court for an award. The claimant was informed of the Minister's decision by a letter dated 21 January 1995.

- F** The claimant then moved the High Court at Kuala Lumpur for an order of certiorari and mandamus against the Minister's decision. The claimant was successful before the High Court as well as before the Court of Appeal.

- G** *Preliminary objection*

The preliminary objection of the claimant is anchored on whether the question framed by the Federal Court for its determination met with the requirements of s 96(a) of the CJA when granting leave to appeal. Section 96(a) of the CJA reads:

- H** Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with leave of the Federal Court —
- I** (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction 'involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
- (b) ...

According to counsel for the claimant, the High Court decided only one issue, that is, the Minister erred in the exercise of his discretion under s 20(3) of the Act in declining to refer the representations of the claimant to the Industrial Court. Consequently, an order for certiorari and an order for mandamus were issued by the High Court. The Court of Appeal upheld the decision of the High Court.

We agree that the issue is only on the exercise of the discretionary power by the Minister under s 20(3) of the Act. In other words, the High Court and the Court of Appeal did not consider the merits of the claimant's representations at all. This is what the Court of Appeal said at p 5 of its judgment (p 17 of the appeal record, Vol 1):

First and foremost we should make it clear that we are here not hearing this appeal on its merits since the matter was never decided by the Industrial Court. Therefore, whether the suspension was justified or not or whether such a suspension amounted to constructive dismissal or not is not for us to decide in this appeal. What we have to decide is whether the Minister was justified in refusing to refer the matter to the Industrial Court.

It would seem clear to us that the issue is really centred whether on the materials before him, the Minister was right in exercising his discretion under s 20(3) of the Act by declining to refer the representations of the claimant to the Industrial Court on the ground that he thought it was not a fit case.

The words 'the Minister may, if he thinks fit, refer the representations to the court' had been judicially considered by the apex court of this country then, that is, the Supreme Court in *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 where at p 10 Hashim Yeop A Sani CJ (Malaya) said:

There is no question that the power of the Minister under s 20(3) of the Act is wide and the language used by the legislature would seem to confer on the minister a wide discretion whether to refer or not to refer a dispute to the Industrial Court depending on the facts of each case provided of course he has acted bona fide, that is without an improper motive, and he has not taken into account extraneous or irrelevant matters. He has an unfettered discretion but should not be exercised so as to frustrate the object of the statute itself.

In this appeal, at the leave application stage, the company did not rely on the issue of the Minister's power, which was the core issue but instead proceeded on the issue of suspension. This is borne out by the grounds, relied on by the company's officer, Soon Kean Tiong's affidavit at para 15. Further, the application for leave to appeal is against the decision of the Court of Appeal, but then the decision of the Court of Appeal as stated earlier is centred on the Minister's exercise of his discretionary power in declining to refer the claimant's representations to the Industrial Court.

The Minister did not give any reasons for declining to exercise his discretion under s 20(3) of the Act for which he was entitled to (see *Minister of Labour, Malaysia v Chan Meng Yuen & Anor* [1992] 2 MLJ 337). However, according to the Minister, he relied on the information provided

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- A by the director general pursuant to s 20(2) of the Act after a settlement could not be reached. One of the materials that the Minister must have considered in determining whether the claimant was dismissed without just cause or excuse or as the claimant put it, he was constructively dismissed, would be on the suspension issue. In other words, what is the effect of the contract of employment of the claimant with the company, wherein there is
- B no express term for the company to suspend the claimant indefinitely for investigations, even though there was no loss of emoluments, perks etc. It may well lead to the issue of whether there has been a breach of the contract of employment by the company and thereby entitling the claimant to treat the repudiatory act of the company as affecting the foundation of the contract, and therefore consider himself as constructively dismissed (*Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at p 95).
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The High Court and the Court of Appeal did not consider the issue of suspension except to say that it may be relevant for the purpose of determining whether the claimant was entitled to declare that he was constructively dismissed. This issue involved mixed questions of law and fact for the Industrial Court (*Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238). Further, the question as framed seems to indicate that it is a point of law, in which case then, the proper forum to consider would be the Industrial Court and eventually, if need be, the various level of the courts in our judicial system. Hence, the Minister erred in the exercise of his discretion under s 20(3) of the Act as held by the High Court and upheld by the Court of Appeal. It is best that we say no more on this issue.

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- F It seems clear to us that the Federal Court was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. To that extent, the proper order that we should make would be to regrettably decline to answer the question. It is best that the issue of suspension be considered by the Industrial Court in determining whether the claimant was dismissed without just cause or excuse, or as he put it 'constructively dismissed'.

- G In the circumstances of the case, we agree with the preliminary objection of counsel for the claimant that the question framed by this court for its determination does not come within the ambit of s 96(a) of the CJA. In the result, we need not consider the merits as submitted by counsel for the parties, and it follows that both appeals must be dismissed with costs and we so order. In our view, we can make such an order without considering the merits of the appeal (*Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65). The deposit to the claimant towards his taxed costs.
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Preliminary objection allowed.

Reported by Jafisah Jaafar

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